OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 15 April 1986 *

Mr President,
Members of the Court,

In this case the Court is asked to assess the compatibility with Community law of the differential pricing system for milk applied in the United Kingdom until the spring of 1984. According to the defendant the system was discontinued at that time for purely commercial reasons, without prejudice to the question of its legality.

I — The background of the proceedings

The milk and milk products sector is governed by a common organization of the market within the meaning of Article 40 of the EEC Treaty, established by *Regulation No 804/68* of the Council of 27 June 1968. [1]

On the accession of the United Kingdom to the Community in 1973 the problem arose of the integration in that common organization of the British system for the production and marketing of milk and milk products, which is in many respects quite different from the continental system.

The characteristic feature of the British system is the existence of the Milk Marketing Boards, established in 1933 in England and Wales, soon afterwards in three Scottish regions and in 1955 in Northern Ireland. They have a number of prerogatives, the most important of which will be discussed below.

The continued existence of the Milk Marketing Boards, subject to the provisions of the EEC Treaty and of secondary legislation, was accepted in the declarations on liquid milk, pigmeat and eggs of 27 October 1970, annexed to the Final Act of Accession.

It seems to have been considered at the time that there would be no need to amend the existing Community regulations in the three sectors mentioned in order to take into account the concerns expressed by the United Kingdom delegation during the negotiations. [2]

Subsequently, however, it became clear that the British marketing boards did in fact raise serious problems from the point of view of Community law.

In several cases the Court has had occasion to give rulings regarding marketing boards or national or regional organizations for the development or marketing of various agricultural products. [3]

In Case 83/78 *Pigs Marketing Board*, the Court held that marketing schemes such as the Pigs Marketing Board were incompatible with the requirements of Articles 30 and 34 of the EEC Treaty and of the regulation on the common organization of the market in question (paragraph 65 of the decision).

* Translated from the French.

1 — Official Journal, English Special Edition 1968 (I), p. 176.

2 — *Treaties establishing the European Communities*, 1978 Edition, pp. 1304 to 1307.

3 — See in particular: Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347; Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083; Case 123/83 *Bureau Interprofessionnel du Cognac* v *Guy Clair*, [1985] ECR 391.

The Court stated in particular that:

'Any provisions or national practices which might alter the pattern of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely within the State in which they are established, or in any other Member State, in conditions laid down by Community rules and from taking advantage directly of intervention measures or any other measures for regulating the market laid down by the common organization are incompatible with the principles of such organization of the market' (paragraph 58).

The Court added that:

'Any intervention by a Member State or by its regional or subordinate authorities in the market machinery apart from such intervention as may be specifically laid down by the Community regulation runs the risk of obstructing the functioning of the common organization of the market and of creating unjustified advantages for certain groups of producers or consumers to the prejudice of the economy of other Member States or of other economic groups within the Community. In this respect it is impossible to accept the Board's argument to the effect that its price policy is dependent upon market trends and accordingly does not perturb the formation of prices according to the regulation' (paragraphs 60 and 61).

In this case, however, the Court is not called upon to examine the compatibility of the Milk Marketing Boards with the Treaty. The Council has modified the common organization of the market in the milk and milk products sector in order to make it possible to authorize the establishment of organizations of that nature.

That change was made by Council *Regulation (EEC) No 1421/78* of 20 June 1978, amending Article 25 of Regulation No 804/68.[4]

In view of the high cost to the Community of the intervention scheme established under Regulation No 804/68, the Council considered it appropriate to provide for other mechanisms for attaining the objectives set out in Article 39 of the Treaty, thereby reducing recourse to intervention measures.

Since certain activities of the Milk Marketing Boards in the United Kingdom had helped to ensure that most of the milk produced there was used for direct human consumption, the Council found it advisable to provide for the recognition of the Boards and, in comparable situations, equivalent organizations in other Member States, whilst ensuring that their prerogatives were compatible with Community law and that the general principles of the Treaty were observed (see the preamble to Regulation No 1421/78).

The prerogatives in question are *inter alia* the exclusive right to purchase milk from producers established in a particular area. The counterpart of that right is the obligation on the part of the organization to purchase milk which meets certain minimum requirements.

The Milk Marketing Boards also have the right to equalize the prices paid to producers, irrespective of the use for which the milk purchased from them is intended.

According to the new Article 25, authorization may be granted to an organization

4 — Official Journal 1978, L 171, p. 12.

such as a milk marketing board only if it represents certain proportions of producers and production and if the quantity of milk used in the Member State concerned for direct human consumption in the form of whole milk or other fresh products reaches the percentages laid down in Article 25 (2).

Finally, the grant of authorization to such organizations is subject to the observance of general rules to be laid down by the Council with a view to ensuring, *inter alia*, that the exercise of their prerogatives:

(i) is consistent with the general principles of the Treaty, in particular as regards the free movement of goods, and avoids discrimination against producers selling their milk to the organization and persons wishing to buy milk from it;

(ii) does not affect competition in the agricultural sector more than is absolutely necessary;

(iii) does not jeopardize the efficient functioning of the market in milk and milk products, particularly as regards price and intervention arrangements.

In *Regulation (EEC) No 1422/78*,[5] adopted the same day in implementation of that regulation, the Council specified the conditions under which the United Kingdom was authorized to grant special rights to the five Milk Marketing Boards. In particular, *Article 9 (1)* provides that the *selling prices applied by the Milk Marketing Boards must be identical for all buyers concerned and may be differentiated only*:

(a) on the basis of the use intended by the buyer;

(b) on the basis of other criteria established in negotiations at which the Milk Marketing Boards and their milk purchasers are represented on an equal footing.

Article 9 (2) adds that differentiation on the basis of intended use may not have the effect of causing distortion of competition on the United Kingdom market between milk products from other Member States and local products. *Article 10* requires the United Kingdom to take the necessary measures for continuing supervision of compliance by the Milk Marketing Boards with Community principles and rules and with special conditions governing the authorization.

By *Regulation No 1565/79* of 25 July 1979,[6] the Commission authorized the United Kingdom to grant the special rights in question to the Milk Marketing Boards, and required it, under *Article 6* (1), to adopt the necessary detailed provisions for continuing supervision of compliance with Article 9 of Regulation No 1422/78. Article 6 (2) adds that those provisions must determine in particular a definition of the possible 'uses' referred to in Article 9 (1) (a) and the 'other criteria' of an objective nature which may be taken into consideration under Article 9 (1) (b). The second subparagraph of Article 6 (2) provides that 'differentiating the selling price on the basis of the use to which the milk is put or on the basis of other objective criteria shall only be excluded in so far as it could lead to a discrimination between milk buyers and in so far as it may be an obstacle

5 — Council Regulation (EEC) No 1422/78 of 20 June 1978 concerning the granting of certain special rights to milk producer organizations in the United Kingdom (Official Journal 1978, L 171, p. 14).

6 — Commission Regulation (EEC) No 1565/79 of 25 July 1979 laying down rules for implementing Regulation No 1422/78 (Official Journal 1979, L 188, p. 29).

to the normal functioning of the common market organization and, in particular, its intervention system and Community aid schemes'.

In order to ensure its conformity with the Community rules the British legislation was amended by the Milk Marketing Boards (Special Conditions) Regulations 1981, applicable to the whole of the United Kingdom, and by the Milk Marketing Scheme (Amendment) Regulations 1981, applicable to each of the five Milk Marketing Boards, including the Milk Marketing Board for England and Wales.[7] In view of the predominant position of the Milk Marketing Board for England and Wales the parties have agreed to base this case on its practices, which are substantially the same as those of the other Milk Marketing Boards.

Under that legislation, in particular *Paragraph 66* of the Milk Marketing Scheme 1933, as amended, milk prices are fixed by a Joint Committee composed of representatives of the Milk Marketing Board and of the Dairy Trade Federation, in accordance with Article 9 (4) of Regulation No 1422/78.[8] Paragraph 66 (8) provides that the price of milk sold by the Board is to be set at the same level for all buyers who intend to use the milk for the same purpose, but permits the Joint Committee to negotiate different prices to take into account certain special circumstances. Subject to that provision, paragraph 66 (7) authorizes the Joint Committee to negotiate prices different from the standard price for milk sold for human consumption where the milk is sold for use in the production of a number of specified commodities, including butter and cream.

Acting pursuant to that provision, the Milk Marketing Board for England and Wales applied a very wide range of selling prices for milk. The list of minimum selling prices for milk delivered in September 1983, transmitted to the Commission in accordance with Article 9 (5) of Regulation No 1422/78, shows that the price of milk sold for butter production differed according to whether the butter was to be sold into intervention or on the bulk butter market, on the one hand, or on the retail packet butter market on the other. Within each of those categories a further price differentiation was made according to whether the skimmed milk obtained in butter production was intended to be sold for animal feed, for the manufacture of skimmed-milk powder or for other uses. That second differentiation was also made in respect of milk sold for the production of cream.

The Commission considered that those practices went further than was permitted by the Community regulations, and on 10 June 1982 it initiated the procedure provided for in Article 169 of the EEC Treaty against the United Kingdom. A reasoned opinion was issued on 10 June 1983, and the matter was brought before the Court by an application lodged at the Court Registry on 25 January 1984. On 5 November 1984 the French Government intervened in support of the Commission's claim that the Court should declare that by permitting the Milk Marketing Boards to apply different prices for whole milk as described above the United Kingdom had

7 — *Statutory Instruments 1981* No 322 and No 323, which came into force on 1 April 1981.

8 — That had been the case since 1979 under *Statutory Instrument 1979* No 249, which came into force on 4 April 1979; its provisions were included in virtually identical terms in *Statutory Instrument 1981* No 323.

failed to fulfil its obligations under Article 10 of Regulation No 1422/78 and Article 6 of Regulation No 1565/79.

II — Legal issues

A — *Preliminary legal arguments and objections of inadmissibility raised by the United Kingdom*

1. According to the defendant, the Commission had been aware since late 1978 of the dual pricing system for milk operated by the Milk Marketing Boards, but had none the less authorized the Milk Marketing Boards by Regulation No 1565/79; it should not therefore have brought proceedings under Article 169 but should have made use of its powers under Article 2 (3) of Regulation No 1565/79 to adopt 'supplementary general implementing rules or specific decisions . . . should this prove necessary'. Furthermore, under Article 9 (5) of Regulation No 1422/78 the Commission could and should have referred the prices in question to the Management Committee for Milk and Milk Products for examination.

Those arguments do not seem to me to be relevant. The Commission's criticisms concern the application of existing provisions. The problems raised cannot therefore be resolved by means of supplementary implementing rules or specific decisions.

On the other hand, instead of bringing proceedings under Article 169 the Commission could have withdrawn the authorization granted to the United Kingdom, as provided for in Article 1 (3) (b) of Regulation No 1422/78 in the event that the conditions laid down are no longer fulfilled. No doubt the reason it did not do so was that it did not wish to call in question the whole Milk Marketing Board system. I shall not therefore discuss this issue further.

The Commission has submitted to the Court the minutes of only one meeting of the Management Committee for Milk and Milk Products at which the pricing practices of the Milk Marketing Boards were examined. We must therefore assume that those practices were examined only once. That does not seem to me to be in accordance with Article 9 (5) of Regulation No 1422/78, for it cannot be supposed that in all those years the United Kingdom has communicated the prices to the Commission only once.

However, that failure is not, I think, such as to prejudice the proceedings under Article 169 of the Treaty.

2. The defendant argues that most of the allegations of fact made by the Commission have not been adequately proved, and submits that the Commission's case should therefore be rejected *in limine*.

Since that submission is clearly concerned with the substance of the case it cannot be dealt with at this stage. If, on examining the substance of the case, the Court were to find that the Commission had not adduced sufficient evidence of its allegations, it would be obliged to dismiss the action as unfounded.

3. In order to avoid having to come back to them on each occasion during my discussion of the substance of the case, I should like first of all to state my views on the objections of inadmissibility raised by the United Kingdom with regard to a number of the Commission's submissions on the ground that insufficient reference was made to them during the pre-contentious stage or even that they are entirely new submissions.

The United Kingdom's objections concern in particular the submissions based on the strict interpretation of Article 9 (1) of Regulation No 1422/78, the effect of the dual pricing system on exports of butter from the United Kingdom and interference with the Community aid schemes for butter used for the manufacture of pastry and ice-cream and for skimmed milk used for casein manufacture.

In support of its argument the defendant relies on the judgment of the Court in Case 211/81 *Commission* v *Denmark*.[9] In that judgment the Court held that: 'It follows from the purpose assigned to the pre-contentious stage of the proceedings for failure of a State to fulfil its obligations that a letter giving formal notice is intended to delimit the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence.' It added that since the function of the reasoned opinion which ends the pre-contentious stage is to determine the subject-matter of an application brought under Article 169, 'the two documents must be founded on the same grounds and submissions'.

My views on those objections of inadmissibility are as follows:

(a) It is true that in the letter giving formal notice and in its reasoned opinion the Commission did not expressly assert, as it did in its application to the Court, that differential pricing for milk according to whether it was to be used for the production of bulk butter or of packet butter was in itself a breach of Article 9 (1) of Regulation No 1422/78, quite apart from the effects which that practice might have on the functioning of the common organization of the markets.

There is therefore a degree of doubt as to the admissibility of that argument.

I think, however, that in this case the scope of the application has not been extended and that the Commission has simply stated more precisely objections which it had raised in a general manner in the pre-contentious stage.[10]

In its letter of 10 June 1982 giving formal notice to the United Kingdom, the Commission expressly referred to Article 9 (1) and stated that 'the system of multiple milk prices for butter and cream manufacture and the resulting skim described more fully above jeopardizes not only the principles of free circulation and free competition of the EEC Treaty but also the efficient functioning of the common organization of the market in milk and milk products, particularly as regards price, aid and intervention arrangements and constitutes an infringement of *Article 9 (1) and (2)* of Council Regulation No 1422/78 and Article 6 (1) and (2) of Commission Regulation (EEC) No 1565/79'.[11] It repeated those objections in its reasoned opinion of 10 June 1983.

(b) The Commission's remarks regarding interference with the pattern of exports from the United Kingdom to other Community countries or non-member countries were made in connection with the submission that the pricing system constituted an obstacle to the normal functioning of the common market organization.

As such they do not constitute a new submission but rather a supplementary argument raised by the Commission in support of that more general submission, already discussed in the pre-contentious stage.

(c) Finally, the United Kingdom objects that the Commission's complaints regarding interference with the proper functioning of the aid schemes for butter used for the manufacture of pastry and ice-cream and the aid schemes for skimmed milk used for

9 — [1982] ECR 4547.

10 — See the judgment of the Court in Case 74/82 *Commission* v *Ireland* [1984] ECR 317.

11 — See p. 6 of the letter of 10 June 1982.

casein manufacture are inadmissible because in its letter giving formal notice and in its reasoned opinion the Commission referred only to the aid scheme for skimmed milk used for animal feed.

However, the passage quoted above from the Commission's letter of 10 June 1982, repeated in the reasoned opinion, clearly refers to all the aid schemes established on the basis of Regulation No 804/68. It may therefore be considered that the aid scheme for skimmed milk used for animal feed was referred to only by way of example and that the Commission's submissions with regard to other types of aid are consequently also admissible.

Even if the Commission did not fully develop all its submissions in the pre-contentious stage, and added details to one or other of its submissions in its application to the Court, the United Kingdom was not deprived of the opportunity of presenting its observations in full knowledge of the issues, especially since it is clear from the documents before the Court that the parties had previously exchanged a number of letters on many of the points at issue.

B — *Arguments regarding the dual pricing system for milk used in butter manufacture*

The Commission's submissions regarding the operation of the dual pricing system for milk used in butter manufacture may for the purposes of argument be divided into two categories: those based on Article 9 (1) of Regulation No 1422/78 in conjunction with the first subparagraph of Article 6 (2) of Regulation No 1565/79 (differentiation according to the use to which the milk is put or other objective criteria); and those based on Article 9 (2) of Regulation No 1422/78 in conjunction with the second subparagraph of Article 6 (2) of Regulation No 1565/79 (compliance with Community principles and rules).

I shall begin by examining the first category.

1. *Differentiation according to the use to which the milk is put or other objective criteria*

The Commission's submission is that the price differentiation operated by the Milk Marketing Boards is based neither:

(i) on the use to which the milk is put by the purchaser; nor

(ii) on other objective criteria established by the Joint Committee.

(i) The Commission takes the view that the phrase 'on the basis of the use intended by the buyer' (Article 9 (1) (a) of Council Regulation No 1422/78) can refer only to the manufacture of butter, in whatever form, as opposed to any other milk product, while the British system, which distinguishes according to whether the buyer of the milk intends to sell the butter in bulk into intervention or in packets on the free market, is based on the nature of the buyer. Or as the French Government put it in its intervention, 'the differentiation made by the Milk Marketing Boards is based not on the intended use of the milk . . . but on the intended use of a product other than milk, namely butter'.

The defendant, on the other hand, considers that the phrase 'the use intended by the buyer' refers to the market on which the final product is to be sold. In its view the market for bulk butter and the market for packet butter are separate markets and it is therefore legitimate to apply different selling prices for milk according to whether it is intended for the production of bulk butter or packet butter.

The main distinction between the two arguments is that the United Kingdom's interpretation of the term 'use' as denoting the market concerned envisages a stage which lies beyond the Commission's interpretation of the term as denoting the product, and price differentiation based on the market on which the final product is sold may be viewed as 'second-stage differentiation' in comparison with that based on the product manufactured from the milk. The question is whether such differentiation is in accordance with Article 9 (1) (a) of Regulation No 1422/78.

That is a question of interpretation which can only be resolved by means of careful examination of the wording and intention of that provision.

In my view the wording of Article 9 (1) tends to support the interpretation put on it by the Commission and the French Government. The general rule is that 'prices shall be identical for all buyers concerned'. That is moreover in accordance with the basic idea of single prices inherent in the common organization of the markets.

The exception to that rule, that is to say, price differentiation, must be interpreted strictly: prices, which ought in principle to be identical, 'may be differentiated *only*: ...' (that question must not be confused with the issue whether the failure to comply with that provision is in itself an infringement; I shall come back to that point later).

That interpretation is supported by the general tenor of the measures adopted for the authorization of the Milk Marketing Boards; the Boards' rights and prerogatives have been carefully defined so as to 'ensure that they do not apply them in practice in a manner incompatible with the general principles of the Treaty and Community law' (fourth recital in the preamble to Regulation No 1422/78).

I think it fair to conclude, therefore, that price differentiation on the basis of the use of a milk product is not in accordance with Article 9 (1) (a).

That conclusion is, I think, borne out by the fact that such a differentiation is not likely to 'help to channel the predominant quantity of milk produced in this Member State into direct human consumption' (second recital in the preamble to Regulation No 1421/78). That objective, however, is the main, if not the only, ground for permitting the continued existence of the Milk Marketing Boards under Community law.

Indeed, they were authorized only after the Council had established in Regulation No 1422/78 that the conditions laid down in Article 25 (2), as amended, of Regulation No 804/68 regarding the quantity of milk used for direct human consumption [12] were fulfilled in the United Kingdom.

It may therefore be concluded from all the foregoing that price differentiation according to the intended use of the butter cannot be in accordance with Community law, unless of course it is based on 'other objective criteria' as permitted by Article 9 (1) (b) of Regulation No 1422/78. Let us now consider whether such criteria exist in this case.

(ii) In the Commission's view the distinction between bulk butter intended for sale into intervention and butter intended for sale in packets does not constitute 'another objective criterion' established in accordance with the Joint Committee procedure

12 — In the form of whole milk, semi-skimmed milk, skimmed milk, buttermilk, cream and yoghurt; see Article 4 (2) of Regulation No 1422/78.

provided for in Article 9 (4). That is all the more true, according to the French Government, inasmuch as the prices established under that procedure must comply with the principles laid down in paragraphs 1, 2 and 3 of Article 9, which is not the case here.

The defendant, on the other hand, considers that price differentiation according to the market on which the final product is sold is indeed based on 'other objective criteria', that is to say, the costs of manufacturing bulk butter and packet butter respectively and the prices which may be obtained for them on their respective markets.

That argument assumes that there are in fact two quite distinct markets, a point disputed by the Commission and the French Government. In their view the bulk butter market is not distinguishable from the packet butter market and there is in fact only one market for butter: in both cases we are concerned with a single product, intended to meet the same needs, but viewed at a different stage of the marketing process. There are no differences in the cost structures, merely additional costs for packaging and marketing packet butter.

The United Kingdom replies that markets cannot be viewed simply in terms of production and selling costs, but reflect the interplay of all factors affecting both supply and demand. The differences between the prices obtained on the market for bulk butter and packet butter do not merely reflect cost differences but derive above all from the very different conditions of competition affecting the two products. Factors such as competition from New Zealand butter, which cannot be sold into intervention, and from margarine and the continuing fall in butter consumption affect the price of packet butter only.

One must of course accept that in normal circumstances the price of bulk butter and the price of packet butter are different, and that it is quite possible that that difference is not due only to the additional costs of packaging and marketing packet butter.

But on the other hand it may well be asked why, if there are indeed two separate markets governed by quite distinct conditions, the Milk Marketing Boards have tried to create identical conditions artificially, by selling milk to manufacturers who must bear the higher cost of manufacturing packet butter at a price lower than that of milk sold for the manufacture of bulk butter. Moreover, when the United Kingdom states that an increase in the amount of bulk butter refused by the intervention agencies tends to depress the market price for packet butter, does it not recognize itself that there is a degree of interchangeability and competition between the two types of butter, a sure sign that there is only one market?

Quite apart from those considerations the Milk Marketing Boards were entitled to differentiate milk prices according to that criterion — leaving aside the issue of whether or not it is an 'objective' one — only in accordance with a decision of the Joint Committee. It does not appear, however, that such a decision was ever made. Although the defendant stated in paragraph 14.23 (p. 88) of its defence that, contrary to the Commission's contention, the criterion had been established in accordance with the procedure referred to in Article 9 (4) of Regulation No 1422/78,

as required by Article 9 (1) (b), it was not able to provide evidence of that.

First of all, paragraph 66 (8) of the Milk Marketing Scheme 1933, as amended, which lays down, in accordance with the second indent of Article 6 (2) of Regulation No 1565/79, the 'other objective criteria' which may be taken into consideration by the Joint Committee, does not refer to it. On reading the list of criteria it is immediately apparent that all of them are directly concerned with the milk itself (quantity, description, quality, condition of the milk, place where the milk is produced or processed, the place, dates and any special conditions of delivery) and none of them concerns the market on which the product manufactured from the milk is to be sold.

Furthermore, even though paragraph 66 (8) (g) provides that with the approval of the Minister any other objective criterion may be taken into account by the Joint Committee, in its reply to the express request of the Court to 'specify whether and, if so, in what circumstances the Joint Committee procedure has been used to establish new objective criteria' the defendant could say only that 'the adoption of a single price for the butterfat element of milk for the production of butter has made it unnecessary for the Joint Committee to establish new objective criteria'. It may be inferred from that that before the practices in question were discontinued only the criteria set out in paragraph 66 (8) could legitimately be taken into account by the Joint Committee.

It must therefore be concluded that the dual pricing system for milk used in the manufacture of butter as operated by the Milk Marketing Boards was not based on 'other objective criteria' within the meaning of Article 9 (1) (b) of Regulation No 1422/78 and the second indent of Article 6 (2) of Regulation No 1565/79.

(iii) If the Court agrees with those conclusions the question arises whether that is the end of the matter and it can hold that the United Kingdom has failed to fulfil its obligations without going on to consider the second series of submissions put forward by the Commission which concern the breach of what I have termed Community principles and rules. In other words, does the failure to comply with Article 9 (1) of Regulation No 1422/78 constitute a breach of Community law in itself, or does such a breach arise only where one or other of the criteria referred to in Article 9 (2) and (3) of that regulation or in Article 6 of Commission Regulation No 1565/79 are also met?

To reply in the affirmative to the first limb of the question amounts to saying that the dual pricing system for milk was illegal *per se* even if it did not in fact lead to distortion of competition, discrimination or interference with the proper functioning of the common organization of the market. A negative reply would mean that the system was illegal only if it could also be shown that there was distortion of competition, discrimination, or interference with the proper functioning of the common organization of the market.

That issue was raised by the defendant, which, as we have seen, has argued against the strict interpretation of that article, on which the argument that the system was illegal *per se* was based.

In support of its argument the defendant relies on letters and documents emanating from the Commission prior to the adoption of Regulation No 1565/79 and to the initiation of the Article 169 procedure and on the wording of the second subparagraph of Article 6 (2) of Regulation No 1565/79.

The defendant also considers that a strict interpretation is not necessary, since adequate safeguards are provided, *inter alia*, in Article 9 (2) and (3) of Regulation No 1422/78. Such an interpretation is also contrary to the principle of proportionality, since the result could be that a State could be held to have failed to fulfil its obligations without it being necessary to show that any harm was done.

First of all, even if certain statements on the part of the Commission do suggest that its point of view has changed somewhat, those statements cannot be allowed to take precedence over the wording of Article 9 (1) itself, which it must be recalled is part of a Council regulation binding in its entirety and directly applicable in all Member States. The interpretation to be adopted here is not the interpretation which the Commission may have given to that article in its contacts with one Member State, an interpretation which, moreover, is challenged by other Member States, but the interpretation which follows from the wording of the provision and the general scheme of the regulation.

That is also true of the argument based on the wording of the second subparagraph of Article 6 (2) of Regulation No 1565/79. In adopting that provision implementing Council Regulation No 1422/78 the Commission could certainly not alter the sense of or render inoperative a rule laid down by the Council in the basic regulation.

It can only be understood, therefore, as adding further details to the provisions of Article 9 of Regulation No 1422/78, whose tenor remains unaltered.

Furthermore, ambiguous though it may be, the wording of the second subparagraph of Article 6 (2) of Regulation No 1565/79 does not, I think, necessarily justify the conclusion that the differentiation of milk prices at issue was not prohibited *per se*.

After requiring the United Kingdom to adopt the necessary detailed provisions for continuing supervision of compliance with Article 9 of Regulation No 1422/78, determining in particular the possible 'uses' and the 'other criteria' of an objective nature referred to in that article, Article 6 goes on to provide that:

'Differentiating the selling price on the basis of the use to which the milk is put or on the basis of other objective criteria shall only be excluded in so far as it could lead to a discrimination . . . '.

Clearly, that provision can also be read as *always* prohibiting differentiation on a basis other than that of the use of the milk or of other objective criteria in the sense referred to above and as prohibiting differentiation *even on those bases* 'in so far as it could lead to a discrimination between milk buyers and in so far as it may be an obstacle to the normal functioning of the common market organization and, in particular, its intervention system and Community aid schemes'.

Since the provision must be interpreted strictly, that interpretation seems to me to be the only justifiable one. It follows that in this case the differentiation, since it was not established on the basis of the use of the milk or of other objective criteria, was illegal *per se*.

Reference to Article 9 (2) and (3) of Regulation No 1422/78 reveals nothing to invalidate that conclusion.

With regard to Article 9 (2) the foregoing remarks regarding the second subparagraph of Article 6 (2) of Regulation No 1565/79 are equally applicable: even differentiation on the basis of the intended use, as referred to in Article 9 (1) and permitted in

principle, is prohibited if it has the effect of distorting competition on the United Kingdom market between milk products from other Member States and local products. *The existence of such distortion need only be proved if the differentiation applied is based on the intended use of the milk, in the sense indicated earlier. That is not the case here.*

Since Article 9 (3) is essentially no more than a back-up measure for Article 9 (2), inasmuch as it sets a minimum selling price for the Milk Marketing Boards in order to avoid any risk of such distortion, the same reasoning must apply to it.

The defendant's argument based on what it calls 'additional safeguards' may equally be used in the opposite sense, to say that the very fact that such additional criteria were laid down emphasizes the exceptional nature of differential prices for milk and thus the need to interpret strictly the provisions making it possible to apply such price differentiation.

With regard to the principle of proportionality it is enough to refer to what I have already said on the meaning of the phrase 'the use intended by the buyer': it was because of the special rights and prerogatives conferred on the Milk Marketing Boards, in relation to what might be termed 'normal' Community provisions, that very strict conditions and constraints were imposed on them. Taking into account the exceptional nature of this scheme I cannot go so far as to say that those conditions and constraints are out of proportion to the desired objective of ensuring that those special rights and prerogatives are exercised in accordance with the general principles of Community law.

I therefore conclude from all the foregoing that, quite apart from its practical effects, the dual pricing system for whole milk used in butter manufacture according to whether the butter was to be sold as bulk or intervention butter or as packet butter on the retail market, as operated by the Milk Marketing Boards, was contrary to Article 9 (1) of Council Regulation No 1422/78, and that by authorizing the Milk Marketing Boards to operate such a system the United Kingdom has failed to fulfil its obligations under Article 10 of that regulation and Article 6 of Commission Regulation No 1565/79.

However, since the plaintiff, in support of its application, has raised other submissions based on the relevant provisions of the regulations in question, I shall go on to consider them as well.

2. *Compliance with Community principles and rules*

The rules which may not in any event be contravened by the Milk Marketing Boards and the Joint Committees, even where they operate price differentiation in accordance with Article 9 (1), are laid down in two Council regulations and one Commission regulation (above, Part I).

The repetition of those criteria in slightly different terms in three regulations does confuse matters to a certain degree.

I propose to follow the manner in which the Commission has set out its complaints in its application, based on a combination of Article 9 (2) of Regulation No 1422/78 and the second subparagraph of Article 6 (2) of Regulation No 1565/79. Under those provisions the differentiation of milk prices may in no event:

(i) cause distortion of competition between milk products from other Member States and local products;

(ii) lead to discrimination between milk buyers;

(iii) present an obstacle to the normal functioning of the common market organization and, in particular, the intervention system; and

(iv) present an obstacle to the normal functioning of Community aid schemes.

Before examining the question whether or not the British milk pricing system was incompatible with one or other of those criteria it may be helpful to summarize the method of calculation used in the United Kingdom. During the period in question, that is to say from 1 May 1978 until the spring of 1984, the Joint Committee set the price of milk on the basis of an estimate of the market price of the end products, from which manufacturing costs and a profit margin for the manufacturer were deducted. That method was used in fixing both the price of milk to be used for the manufacture of bulk butter and that of milk to be used for the manufacture of packet butter: only the manufacturing costs were different, and the profit margin remained essentially the same in both cases.

It may be said that that method, reduced to its essentials, guaranteed manufacturers ofmilk products a given profit margin, whatever the state of the market, and compensated manufacturers of packet butter for the additional packaging and distribution costs borne by them in relation to manufacturers of bulk butter. That is to say, it allowed manufacturers of packet butter to buy milk at a lower price.

Was that method of calculation compatible with the Community principles and rules discussed above?

In examining that question I think most of the figures, tables and statistics placed before the Court may be disregarded.

In the first place, the parties have in general offered diverging interpretations of those figures.

Furthermore, a detailed comparison with what would have happened had another price system been applied is naturally impossible.

Finally, according to the wording of the second subparagraph of Article 6 (2) of Regulation No 1565/79 itself, it is in any event sufficient that the practice in question may result in discrimination between milk buyers or present an obstacle to the normal functioning of the common market organization and, in particular, its intervention system and Community aid schemes.

I think the same principle of potential harm can be applied by analogy with regard to conditions of competition, especially since the Treaty itself and the Court do not in general require that there should have been actual distortion of competition in order for it to be held that an infringement has taken place, merely that there should have been a risk or threat of distortion.

Let us consider, then, the various complaints made by the Commission.

(i) *Distortion of competition*

Numerous factors indicate that while the dual pricing system operated there was distortion of competition in favour of British manufacturers of packet butter and to the detriment of butter exporters in the other Member States.

Since the milk price was calculated by the Joint Committee on the basis of the expected selling price for packet butter, minus manufacturing costs and a profit margin, British manufacturers of packet butter had a competitive advantage equi-

valent to a more or less significant portion of the manufacturing costs and the profit margin.

The extent of that competitive advantage could vary according to the circumstances.

If the calculation was based on a low market price for butter, the price of milk was substantially reduced and the competitive advantage was therefore a large one.

Conversely, if a higher market price was taken into account, the advantage was less significant.

The system thus had an element of flexibility that automatically worked to the benefit of British producers: the price paid by them for milk was calculated so as to take into account the conditions prevailing on the British market for packet butter.

In order to continue to sell to the United Kingdom when market prices were low, exporters from other Member States were obliged to cut their profit margin, whereas the profit margin of British producers remained more or less the same; in those circumstances the export of butter to the United Kingdom was likely to become unprofitable and therefore impossible.

If there had been no differentiation of milk prices in the United Kingdom, British manufacturers of packet butter would also have been obliged to reduce their profit margins if the state of the market so required, and more normal conditions of competition would have been re-established.

The argument that the production cooperatives which exist in the other Member States also obtain different prices for the milk used in different dairy products is unconvincing.

Those cooperatives are in competition with other cooperatives in the same or neighbouring countries, or with industrial dairies. If a particular cooperative does not sell as much milk as possible in the form of liquid milk for direct human consumption or in the form of products for which a relatively good price can be obtained, such as yoghurt, cream or high-quality cheese, and the rest in the form of butter or milk powder at prices equivalent to the intervention price, its members are likely to leave it in order to join other cooperatives or deliver their milk to private firms.

The great majority of milk producers in the United Kingdom, on the other hand, have no real possibility of leaving the Milk Marketing Boards. The Boards are thus able to sell part of their milk at a price lower than the equivalent of the intervention price for butter, thus creating distortion of competition with regard to products obtained from the processing of milk bought at the reduced price.

Nor can the defendant's argument that the competitive relationship to be taken into account is that between milk producers, not butter producers, be accepted. It runs counter to the wording of Article 9 (2) of Regulation No 1422/78, which speaks of competition between milk products in general. Furthermore, in its argument on the facts, the defendant itself has referred to the British market in *milk products* and in particular to what it asserts is vigorous and effective competition on the butter market, characteristic features of which are imports, competition from margarine and a decline in butter consumption.

In that context the United Kingdom has argued that the net profit of British manufacturers of packet butter fell to a particularly low level in 1977 and early 1978, and that they would therefore have

been obliged sooner or later to withdraw from the market if the dual pricing system had not been introduced.

That argument is unconvincing. In such circumstances the net profit of exporters from other Member States selling on the British market must have declined to the same extent, and there is nothing to suggest that the British market would have been taken over by those exporters, who were obliged, moreover, to bear higher transport costs.

The figures provided by the Commission at the Court's request, prepared by an independent British consultant (AGB), show that between 1977 and 1983 the market share of butter produced in the United Kingdom increased considerably: an increase of 125% in the United Kingdom as a whole and of 145% in England.

During that period New Zealand maintained its market share, but the market share of butter from other Member States declined by nearly 40%.

Those figures clearly show that even if the new pricing system had not been introduced, the British manufacturers would probably not have been obliged to withdraw from the market.

In examining the competitive situation of butter on the British market it should not be forgotten that imports from New Zealand are subject to diminishing quotas, and that in order to limit increases in butter prices in the United Kingdom and improve the competitive position of butter in relation to margarine the United Kingdom was authorized to subsidize butter consumption. At one point the subsidy, which also applied to imported butter, was as much as UKL 315.15 per tonne. It was discontinued only on 27 May 1985.

Finally, it is not disputed that during the periods March-June 1983 and January-May 1984 the lowest prices recorded for British butter were lower than the lowest comparable prices for butter imported from other Member States, a situation prohibited by Article 9 (3) of Regulation No 1422/78 in so far as it is a result of the selling price applied by the Milk Marketing Boards for milk (Article 6 (5) of Regulation No 1565/79).

In my opinion the United Kingdom's explanations in the documents before the Court fail to establish that the selling price for milk was not the source of those particularly low butter prices.

(ii) *Discrimination between milk buyers*

There can be no doubt, I think, that there was discrimination between milk buyers, inasmuch as they were charged different prices for the same product, milk, which they intended to use in the manufacture of the same product, butter. Even if the market for bulk butter is separate from the market for packet butter, as the United Kingdom asserts, there should be nothing to prevent the difference between the two markets from being reflected in the selling price for butter. Even in those circumstances, to vary the price of milk in order to create identical situations where these would not otherwise exist constitutes discrimination which cannot be justified on objective grounds.

The argument to the effect that there is no discrimination between buyers if they themselves decide, in the course of a statutory procedure conducted fairly, equally and at arm's length in the context of the Joint Committee, to buy milk at different prices is contradicted by the wording of Article 9 (4) of Regulation No 1422/78, which provides

that prices established under the Joint Committee procedure must be set in accordance with the provisions referred to in the other paragraphs of Article 9. Even if the principle that there should be no discrimination between milk buyers is not reaffirmed in those other paragraphs, it is a basic principle of the whole scheme, as follows from Article 25 (as amended) of Regulation No 804/68, introduced by Regulation No 1421/78, and from Article 6 (2) of Regulation No 1565/79.

Furthermore, in Case 222/82 *Apple and Pear Development Council* v *Lewis*[13] the Court held, I think, that express approval by a large number of producers and persons carrying on business or employed in a particular agricultural sector cannot render lawful conduct which is in breach of the Treaty.

(iii) *Obstacle to the normal functioning of the common market organization*

The fourth recital in the preamble to Regulation No 804/68 on the common organization of the market in milk and milk products states that 'in the milk sector, in order to stabilize markets and to ensure a fair standard of living for the agricultural community concerned, it is necessary that the intervention agencies continue to take intervention measures on the market, *such measures however to be standardized so as not to impede the free movement of the goods in question within the Community*'.

It is clear that since the profit margin of British producers was guaranteed and virtually identical whether they sold on the free market (in packets) or into intervention (in bulk), there was no real incentive for them to sell into intervention or to seek more favourable export outlets, even if prices on the British market were lower than the intervention price or the prices which could be obtained in other Community countries or in non-member countries.

On the contrary, there might be every reason for those producers to continue to sell on the British market in order to maintain and improve their position there to the detriment of exporters from other Member States, who could not compete in the face of such low prices.

(It should be pointed out that an exporter from another Member State who found that he could not sell his goods in the United Kingdom at a worthwhile price would not be able to sell them to the intervention agencies in that country, since under Article 1 (3) of Regulation No 985/68 of the Council,[14] so long as common quality standards for butter have not been adopted, holders of butter may offer it only to the intervention agency of the Member State in whose territory the butter was produced.)

But the less butter was offered to intervention by British producers, the more was placed on the open market, the lower the price of butter fell and with it the price at which the Milk Marketing Boards sold milk.

There was thus a kind of vicious circle. The competitive position of exporters from other countries (who, let it be recalled, buy milk at prices which are not flexible) became

13 — [1983] ECR 4083 at p. 4124.

14 — Regulation (EEC) No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream (Official Journal, English Special Edition 1968 (I), p. 256).

more and more difficult and free trade in milk products, which should be encouraged by the uniform application of intervention measures, was jeopardized.

Finally, another effect of the system was that the price obtained by British milk producers was pushed downwards.

The issue here was not so much the question whether intervention purchases took place in other Member States instead of in the United Kingdom, [15] but the central question of the normal functioning of the common market organization.

It may seem paradoxical to argue in favour, as it were, of a still greater increase in intervention purchases, which, because of the considerable increase in milk production in the United Kingdom, have increased there too in any event.

So long as the market organization retains its present form, however, the intervention mechanisms must be permitted to operate.

(iv) *Obstacle to the operation of aid schemes*

Finally, the Commission contends that the dual pricing system in the United Kingdom had the effect of reducing the real level of Community aid to British manufacturers of pastry and ice-cream.

In that regard I must make a general remark which applies equally to the question of aid for skimmed milk, which I shall discuss below.

It follows, I think, from the text of the regulations that when the Council decides to establish an aid scheme to encourage sales of an agricultural product to buyers other than intervention agencies (for example, for use in the manufacture of pastry products or, in the case of skimmed milk, animal feed), it normally starts with the common price of the product (for example, the intervention price) and calculates on the basis of that price the subsidy necessary to make the use of the product sufficiently attractive:

(a) for the end user, so that he will use it in the place of other products (for example margarine or compound feedingstuffs);

(b) for the holder of the agricultural product in question so that he will not find it preferable to offer the product to intervention.

It should not be forgotten that it may be advantageous for a dairy, for example, to manufacture a certain quantity of milk powder per year in order to amortize the cost of its drying plant (see paragraph 20.44 of the defence).

For the purposes of that reasoning it is therefore essential that there should be a single base price for the agricultural product in question, and it is tempting to conclude that as a general rule aid schemes are disrupted when differential pricing of the agricultural product concerned is operated in a Member State.

The real state of affairs is more complicated, however, and a thorough examination of each aid scheme cannot be avoided.

Commission Regulation (EEC) No 1932/81 of 13 July 1981 on the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs (Official Journal 1981, L 191, p. 6) provides that the amount of

15 — Even though it could be held that the proper functioning of the intervention system in another Member State is interfered with if sales to intervention there are unduly increased because of the difficulty of exporting to the United Kingdom.

special aid is to be fixed in accordance with a standing tendering procedure (Article 1).

Undertakings take part in an individual invitation to tender by submitting a written tender indicating the level of aid proposed (Article 5).

In the light of the tenders received in response to each individual invitation, a maximum amount of aid is fixed for butter and concentrated butter (Article 7).

A tender is rejected if the aid proposed is higher than the maximum amount of aid fixed for the individual invitation to tender (Article 8).

It appears furthermore from Council Regulation (EEC) No 1723/81 of 24 June 1981 (Official Journal 1981, L 172, p. 14), which laid down the general rules for the scheme, that its objective is to establish aids reducing the price of butter to a level comparable with that paid for intervention butter (second recital in the preamble).

It may therefore be concluded that the objective of the aid scheme is achieved when the persons concerned can obtain the butter at such a price.

In my view the Commission has not shown that that was not the case in the United Kingdom.

The Commission pointed to the fact that a lower price was charged for milk intended for the manufacture of packet butter. That price was applicable only in that particular case, however, and it does not seem to me that its existence was likely to prevent manufacturers of pastry products or ice-cream from obtaining bulk butter at a price close to the intervention price. That complaint must therefore be rejected.

C — *Arguments based on the differentiation of the price of milk according to the intended use of the resulting skimmed milk*

The Commission contends that the differentiation of prices of whole milk used for the manufacture of butter or cream according to the intended use of the resulting skimmed milk was an obstacle to the normal functioning of the Community aid schemes for liquid skimmed milk used for animal feed on the one hand and for casein manufacture on the other.

The Commission bases its argument on the fact that the price of whole milk was higher when the resulting skimmed milk was intended for one of those uses than when it was intended for the manufacture of skimmed-milk powder.

In its view the real level of the aid is reduced if the user of liquid skimmed milk is obliged to pay a higher initial price for his milk. If there had been a single price for milk, the real selling price for skimmed milk would have been lower and the aids would have been more effective.

Here, too, the actual terms of the two aid schemes must be examined separately.

1. Skimmed milk intended for animal feed

Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260) provides that payment to a dairy of aid for skimmed milk is subject to the condition that the dairy has not charged a higher price for the processed skimmed milk than a fixed maximum ex-dairy price. The maximum price is intended to ensure that the objective of the aid is achieved, that is to say, that as much

skimmed milk as possible should be used in the liquid state as animal feed. The maximum price must be fixed in such a way as to maintain the advantage of using skimmed milk as feed. It is therefore fixed with reference to intervention measures for skimmed milk and skimmed-milk powder and the prices of comparable feedingstuffs (second recital in the preamble).

The United Kingdom has contended, and it was not contradicted by the Commission on this point, that skimmed milk intended for such a use was never sold at a price higher than the maximum ex-dairy price.

Disruption of the aid scheme might nevertheless arise where the price of skimmed milk intended for the manufacture of milk powder was fixed at such a low level that it was more advantageous for dairies to process the milk into milk powder than to sell it to farmers.

Regulation (EEC) No 1105/68 of the Commission of 27 July 1968 on detailed rules for granting aid for skimmed milk for use as feed (Official Journal, English Special Edition 1968 (II), p. 379) sets the maximum price of such milk on the basis *inter alia* of the value of the skimmed milk resulting from the intervention price for skimmed-milk powder (sixth recital in the preamble).

It may therefore be presumed that this aid mechanism is not disrupted where skimmed milk is sold to manufacturers of powdered milk at a price which is not lower than the value of the skimmed milk resulting from the intervention price for skimmed-milk powder.

In paragraph 20.14 of its defence, the United Kingdom states that 'in the case of skimmed-milk powder the United Kingdom market realization is close to the intervention price' (I take it that 'close' means slightly higher).

The United Kingdom goes on to state: 'To arrive at the "skim value" of skimmed milk used for powder it is necessary to estimate the expected market realization of skimmed-milk powder and to deduct the costs, mainly the costs of drying'.

The Commission has not shown that the use of that method of calculation resulted in the application of a selling price for skimmed milk to manufacturers of milk powder lower than the equivalent of the intervention price.

I therefore come to the conclusion that the differentiation of prices in the United Kingdom did not disrupt the Community aid scheme for skimmed milk intended for animal feed.

2. Skimmed milk used in casein manufacture

Article 3 of Regulation (EEC) No 987/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk processed into casein or caseinates (Official Journal, English Special Edition 1968 (I), p. 262) establishes the following principle:

Aid paid to manufacturers of casein or caseinates 'shall be so fixed that the return on skimmed milk processed into casein or caseinates is equivalent to that on skimmed milk processed into skimmed-milk powder, calculated:

(i) on the basis of the intervention price; or

(ii) on the basis of the market price for first quality, spray-process skimmed-milk powder, if that price exceeds the intervention price.

Should Community measures have the effect, in a Member State, of increasing the price at which the intervention agency buys in skimmed-milk powder, the aid may be increased by a corresponding amount in that Member State'.

Under that article the aid is thus inseparably linked to the price of skimmed milk intended for the manufacture of casein and caseinates on the one hand and the price of the same type of milk intended for the manufacture of powdered milk on the other.

The Milk Marketing Boards' practice of selling skimmed milk at different prices according to whether it was intended for one purpose or the other was therefore contrary to the basic principles of the aids scheme and must have interfered with its functioning.

Conclusions

I share the view expressed by the Commission at pages 19 and 20 of its application that the United Kingdom is responsible for the pricing system practised by the Milk Marketing Boards.

In so far as is set out above I therefore propose that the Court declare that by authorizing the Milk Marketing Boards

(i) to operate a system of dual pricing for whole milk used in the manufacture of butter according to whether the butter was to be sold as bulk butter or packet butter,

and

(ii) to operate differential pricing for whole milk used in the manufacture of butter and cream according to whether the resulting skimmed milk was to be used for the manufacture of milk powder or of casein and caseinates

the United Kingdom has failed to fulfil its obligations under Article 10 of Council Regulation (EEC) No 1422/78 and Article 6 of Commission Regulation (EEC) No 1565/79.

Since I have in the main upheld the Commission's submissions, I think the United Kingdom must bear the costs, including those incurred by the intervener.